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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/593,791	09/22/2006	Alexander Fuchs	FE 6167 (US)	3239
34872	7590	12/31/2008		
Basell USA Inc. Delaware Corporate Center II 2 Righter Parkway, Suite #300 Wilmington, DE 19803			EXAMINER KRYLOVA, IRINA	
			ART UNIT 4131	PAPER NUMBER
			MAIL DATE 12/31/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/593,791	<b>Applicant(s)</b> FUCHS ET AL.	
	<b>Examiner</b> IRINA KRYLOVA	<b>Art Unit</b> 4131	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 22 September 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 29-63 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 29-63 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>02/25/08; 12/29/06</u> .                                      | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### *Double Patenting*

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 43 and 63 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 9 of copending

Application No. 11/660,183. Although the conflicting claims are not identical, they are not patentably distinct from each other because the copending application claims a blow molded container and a process for producing a blow molded container from a propylene polymer composition using metallocene catalyst, where the propylene polymer composition is the same as claimed in the present invention.

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This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 43 and 63 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5, 22 of copending Application No. 11/660,182. Although the conflicting claims are not identical, they are not patentably distinct from each other because the copending application claims a blow molded container and a process for producing a blow molded container from a propylene polymer composition using metallocene catalyst, where the propylene polymer composition is the same as claimed in the present invention.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 43 and 63 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 43 and 63 provide the process for producing at least one fiber, film or molding, but, since the claim does not set forth any steps involved in the method/process, it is

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unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a process without any active, positive steps delimiting how this process is actually practiced.

### ***Claim Rejections - 35 USC § 102/103***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 29-58 are rejected under 35 U.S.C. 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over **Delaite et al** in US 6,586,528.

As to instant claims 29, 37, 39-41, 44, **Delaite et al** discloses a propylene polymer composition comprising:

1) 55-74 parts by weight of propylene copolymer comprising less or equal to 1% (preferably less than 0.75%) of ethylene units;

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2) 26-45 parts by weight of propylene copolymer comprising 3.5-15 wt% of ethylene units; wherein the composition comprises MFI being at least 1 g/10 minutes, as measured under a load of 2.16 kg at 230°C (7.8-9.7 g/10 min in Table 1) (see col. 2, lines 25-35; col. 7, lines 25-36).

As to instant claim 43, the composition is used for making films or sheets by extrusion or injection molding (see col. 8, lines 29-33; col. 4, lines 10-16).

As to instant claims 30, 31, 38, 42, 45, 46, 47, 48, 49, 50, 51, 52, 58, though **Delaite et al** does not specify tensile E modulus value, melting point, haze, dart impact, WVTR, OTR, CO2TR, MWD of the composition, content of hexane extractables and xylene solubles, however, since the composition of **Delaite et al** is the same as the composition of the instant invention, and, in addition, melt flow value is the same in both application, **therefore**, tensile E modulus value, melting point, haze, dart impact, WVTR, OTR, CO2TR, MWD of the composition, content of hexane extractables and xylene solubles are assumed to be inherent properties of the composition. "Products of identical chemical composition can not have mutually exclusive properties" (See MPEP 2112.01).

Instant claims 32-36, 53-57 define the product by how the product was made (using specified catalyst). Thus, claims 32-36, 53-57 are product-by-process claims. For purposes of examination, product-by-process claims are not limited to the manipulation of the recited steps, only the structure implied by the steps. See MPEP 2113. In the present case, the recited steps imply a structure comprising copolymers of propylene with olefins, including ethylene. The reference suggests such a product.

Claims 29-58, 63 are rejected under 35 U.S.C. 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over **Langhauser et al** in US 5,753,773.

As to instant claims 29, 39, 40, 41, 42, 44, 48, 58, **Langhauser et al** discloses a propylene composition and films/sheets, fibers, shaped articles made from the composition (col. 1, lines 20-24), wherein the composition comprises:

- 1) 60-80% by weight (see Table) of a copolymer of propylene with 0-5% by weight of C2-C10 alkenes;
- 2) 20-40% by weight (see Table) of a copolymer of propylene with 5-98% by weight of further C2-C10 alkenes;

wherein the composition comprises a melt flow index of from 0.5-50 g/10 min at 230°C under a weight of 2.16 kg (col. 2, lines 12-15); and shear modulus of 515-770 MPa (Table, col. 8). As to instant claims 30, 45, the composition comprises melting temperature in the range 143-145°C (col. 8, Table). As to instant claim 38, the composition comprises polydispersity (Mw/Mn) in the range of 1.83-2.01 (col. 8, Table).

As to instant claim 37, the comonomer comprises ethylene (col. 2, lines 1-2).

As to claims 43 and 63, though **Langhauser et al** does not specify the method for producing films/sheets, fibers, shaped articles, however, it is known to a one skilled in the art, that these products are produced by processes including extrusion, injection or blow molding.

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With regard to other properties claimed by Applicant, such as haze, tensile E modulus, dart impact, MVTR, OTR, CO<sub>2</sub>TR, content of hexane extractables and xylene solubles, it is noted here that the present rejection with regard to these properties is made in the sense of **In re Fitzgerald, 619 F.2d 67, 205 USPQ 594 (CCPA 1980)**, which states that when the structure or composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions presumed to be inherent (MPEP 2112-2112.01). A prima facie case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim (in this case, the identical polymeric compositions and films thereof) except for a property or function (in the present case haze, dart impact, tensile E modulus, MVTR, OTR, CO<sub>2</sub>TR, content of hexane extractables and xylene solubles) and the examiner can not determine whether or not the reference inherently possesses properties that anticipate or render obvious the claimed invention but has a basis for shifting the burden of proof to applicant. See also **In re Spada**, 911 F.2d 705, 709 15 USPQ 1655, 1658 (Fed. Cir. 1990), which settles that **when** the claimed compositions **are not novel**, they are not rendered patentable by recitation of properties, whether or **not** these properties are shown or suggested in prior art.

As to claims 32-36, 53-57, the propylene copolymers were produced using metallocene catalyst comprising methyl- or phenylsilaned bis (indenyl) zirconium halide derivatives similar to the structure claimed in the present invention (col. 3, lines 25-67-col. 4, lines 1-55). In addition, claims 32-36, 53-57 define the product by how the product was made (using specified catalyst). Thus, claims 32-36, 53-57 are product-by-process claims.



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For purposes of examination, product-by-process claims are not limited to the manipulation of the recited steps, only the structure implied by the steps. See MPEP 2113. In the present case, the recited steps imply a structure comprising propylene copolymers with olefins, including ethylene. The reference suggests such a product.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 59, 60, 62 are rejected under 35 U.S.C. 103(a) as being unpatentable over

**Langhauser et al** in US 5,753,773 as applied to claim 44 above, and further in view of Henderson in US 2004/0033349.

**Langhauser et al** discloses a propylene composition and films/sheets, fibers, shaped articles made from the composition (col. 1, lines 20-24), wherein the composition comprises:

1) 60-80% by weight (see Table) of a copolymer of propylene with 0-5% by weight of C2-C10 alkenes;

2) 20-40% by weight (see Table) of a copolymer of propylene with 5-98% by weight of further C2-C10 alkenes;

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wherein the composition comprises a melt flow index of from 0.5-50 g/10 min at 230°C under a weight of 2.16 kg (col. 2, lines 12-15).

**Langhauser et al** does not teach multilayer structures or laminates comprising propylene copolymer compositions.

**Henderson** discloses a multilayer coextruded structures having good clarity with low haze, wherein one of the layers comprises propylene copolymers or mixture thereof (Abstract). The propylene copolymers comprise 0.2-10% by weight of ethylene ([0036]).

Since **Henderson** discloses similar propylene copolymer composition, as **Langhauser et al**, but also specifies the use thereof for making multilayer laminates having good clarity, therefore, it would have been obvious to one skilled in the art at the time of the invention was made, to use the composition of **Langhauser et al** in the multilayer structures of **Henderson** to produce multilayer laminates having good clarity with low haze.

Claims 61 is rejected under 35 U.S.C. 103(a) as being unpatentable over **Langhauser et al** in US 5,753,773 as applied to claim 44 above, and further in view of **Anderson et al** in US 2004/0029469.

**Langhauser et al** discloses a propylene composition and films/sheets, fibers, shaped articles made from the composition (col. 1, lines 20-24), wherein the composition comprises:

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1) 60-80% by weight (see Table) of a copolymer of propylene with 0-5% by weight of C2-C10 alkenes;

2) 20-40% by weight (see Table) of a copolymer of propylene with 5-98% by weight of further C2-C10 alkenes;

wherein the composition comprises a melt flow index of from 0.5-50 g/10 min at 230°C under a weight of 2.16 kg (col. 2, lines 12-15).

**Langhauser et al** does not teach coated articles comprising propylene copolymer compositions.

**Anderson et al** discloses a moisture vapor permeable composite sheet comprising a substrate and an extrusion coated polyolefin film layer (Abstract). The polyolefin layer comprises propylene copolymers ([0025]).

Since **Anderson et al** discloses a coated article comprising a substrate and a propylene copolymer film, similar to **Langhauser et al**, having good MVTR, therefore, it would have been obvious to one skilled in the art at the time of the invention was made to use the composition of **Langhauser et al** in the coated article of **Anderson et al**, to produce a coated product with good MVTR.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Mehta et al in US 6,583,227 discloses propylene polymers for making films. Fischer et al in US 6,248,829 discloses a blend of propylene copolymers for making molded articles.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to IRINA KRYLOVA whose telephone number is (571)270-7349. The examiner can normally be reached on Monday-Friday 7:30am-5pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571)272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David R. Sample/  
Supervisory Patent Examiner, Art Unit 4131

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